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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GAVRIELI BRANDS, LLC,)
)
) Plaintiff,)
) C.A. No. 18-462 (MN)
v.)
)
SOTO MASSINI (USA) CORP.,)
et al.,)
)
) Defendants.)

Monday, February 11, 2019
11:00 a.m.
Courtroom 4A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

MORGAN LEWIS & BOCKIUS, LLP
BY: JOHN V. GORMAN, ESQ.
BY: MICHAEL J. LYONS, ESQ.
BY: EHSUN FORGHANY, ESQ.

Counsel for the Plaintiff

STAMOULIS & WEINBLATT, LLC
BY: STAMATIOS STAMOULIS, ESQ.

Counsel for the Defendants

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P R O C E E D I N G S

5 (REPORTER'S NOTE: The following hearing was
held in open court, beginning at 11:00 a.m.)

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10:58:00 8 THE COURT: Good morning. Let's start with
10:58:02 9 some introductions.

10:58:04 10 MR. STAMOULIS: Good morning, Your Honor, Stam
10:58:08 11 Stamoulis.

10:58:08 12 THE COURT: You're so used to being the
10:58:10 13 plaintiff, Mr. Stamoulis, that you stood up first, but
10:58:13 14 that's okay.

10:58:13 15 MR. STAMOULIS: I remarked to Mr. Buckson that
10:58:16 16 I'm a little disoriented because I'm sitting on the wrong
10:58:20 17 side of the courtroom. I apologize for going out of order.

10:58:24 18 Stam Stamoulis on behalf of plaintiff -- I'm
10:58:26 19 sorry, defendant.

10:58:28 20 MR. GORMAN: Good morning, Your Honor. On
10:58:31 21 behalf of the plaintiff, Gavrieli Brands LLC, I'm John
10:58:33 22 Gorman of Morgan Lewis. With me are my colleagues, Michael
10:58:38 23 Lyons and Ehsun Forghany.

10:58:39 24 THE COURT: Welcome here.

10:58:41 25 We are here today for arguments on defendant's

10:58:45 1 motion to dismiss on the jurisdictional basis and on
10:58:53 2 plaintiff's motion, discovery dispute motion. And I have
10:59:01 3 allotted thirty minutes. You can use your time however you
10:59:04 4 choose. I don't know if you have a preference on which
10:59:07 5 motion goes first. I don't.

10:59:09 6 MR. GORMAN: Well, Your Honor, we spoke
10:59:11 7 beforehand. I think what we agreed, depending on what Your
10:59:15 8 Honor wants to do, is that the parties will address both
10:59:18 9 motions at the same time, one party goes and then the other
10:59:21 10 party goes to address both. If it suits Your Honor, we
10:59:24 11 would go first.

10:59:24 12 THE COURT: Sure.

10:59:27 13 MR. GORMAN: Mr. Lyons will be doing the
10:59:29 14 argument, Your Honor.

10:59:30 15 THE COURT: Thank you.

10:59:31 16 Mr. Lyons, did you come down from Philadelphia?

10:59:37 17 MR. LYONS: From California, Your Honor.

10:59:39 18 THE COURT: So lucky you with the snow.

10:59:41 19 MR. LYONS: No, beautiful, actually. It's nice
10:59:44 20 to see a little every year.

10:59:46 21 THE COURT: Thank you for braving it.

10:59:48 22 MR. LYONS: Well, good morning, Your Honor. And
10:59:51 23 as Your Honor mentioned, there are two motions that are on
10:59:53 24 the calendar for today. First of all, there is the motion
10:59:57 25 to dismiss both Mr. Pichler as the defendant personally and

11:00:04 1 the Italian version of the company, Soto Massini Italy.
11:00:09 2 There is no dispute at this point that Soto Massini (USA) is
11:00:13 3 properly part of the dispute going forward, so if it's okay
11:00:16 4 with Your Honor, I would just start there.

11:00:18 5 I think as we get into some of the issues, I
11:00:22 6 think you're going to see there is some interplay with
11:00:26 7 motion to compel because some of the relevant evidence still
11:00:30 8 hasn't materialized. That's one of the reasons why we filed
11:00:33 9 the motion to compel.

11:00:34 10 THE COURT: I have read all of the papers on the
11:00:37 11 motion, the supplemental submissions as well as the motion,
11:00:44 12 the discovery sanctions and production, so you can do
11:00:48 13 whatever you want in the argument, but since I have only
11:00:51 14 given you thirty minutes I thought I should tell you that I
11:00:54 15 have read all of that so you don't have to give me every bit
11:00:57 16 of background you might otherwise.

11:01:00 17 MR. LYONS: Thank you, Your Honor.

11:01:01 18 Well, starting first with the motion to dismiss
11:01:05 19 and why we believe that it would be appropriate for this
11:01:09 20 case to go forward with not only Soto Massini (USA), but
11:01:17 21 Mr. Pichler, and also with the Italian company, we believe
11:01:22 22 all three entities should be part of the case. Some of the
11:01:25 23 recent submissions from defense counsel, they really have
11:01:31 24 been emphasizing and putting forth this is a one-man show.
11:01:35 25 He is everything. He's everyone. It's really just him,

11:01:40 1 whatever name you want to put on it. And we think there is
11:01:43 2 a lot of different ways you can get to jurisdiction, for
11:01:47 3 example, of Mr. Pichler.

11:01:50 4 We think he is a direct actor in this case, so
11:01:54 5 we think the Long Arm Statute in Delaware applies directly
11:01:57 6 to his conduct. And, you know, one of the key aspects of
11:02:02 7 that that we focused on was they have said all of the
11:02:06 8 infringing sales in this case are from the Kickstarter
11:02:11 9 campaign and the Indiegogo campaign. We're going to talk a
11:02:15 10 little more about some of the other sales that are
11:02:18 11 unaccounted for, but there is no dispute that is one of the
11:02:21 12 major focuses of the lawsuit. And Mr. Pichler started that
11:02:26 13 campaign in his own name.

11:02:30 14 Now, he suggest in his papers that they require
11:02:34 15 that, or there is some -- you can't participate in those
11:02:38 16 processes as a company. That's just not true. We put into
11:02:42 17 our papers and we quoted for Your Honor the portion of the
11:02:46 18 rules where they said an organization can do it. I mean,
11:02:50 19 there is no issue with somebody, an individual appearing in
11:02:54 20 connection with that if the company starts it, but in this
11:02:57 21 case, it wasn't Soto Massini (USA) starting those campaigns,
11:03:03 22 it was Mr. Pichler doing it personally.

11:03:05 23 And the whole purpose of those campaigns were to
11:03:08 24 sell products nationally, including to sell Delaware. And
11:03:11 25 at this point it's undisputed that they did actually succeed

11:03:15 1 in getting sales in the U.S., and so you have got him doing
11:03:19 2 business personally in the U.S. You have got him taking
11:03:24 3 steps that led to the tortious conduct, the infringing
11:03:28 4 conduct that gave rise to our claim. So I think you have
11:03:33 5 got all that conduct that would allow you to just keep him
11:03:36 6 in the case personally just based on his own personal
11:03:39 7 infringing conduct outside of the corporation.

11:03:42 8 So we have also submitted evidence in the
11:03:44 9 supplemental submissions about how he uses, for example, his
11:03:48 10 personal Facebook account to talk about company business.
11:03:52 11 And so he really has been the personal driver, and for that
11:03:58 12 reason alone you could assert jurisdiction over him.

11:04:01 13 But there are two other theories as well. Maybe
11:04:04 14 one of the simplest ones is just an agency theory. I think
11:04:08 15 as he said his companies are really just, they're just him
11:04:12 16 and they act as his agents. And so even if the Court
11:04:16 17 focused on Soto Massini(USA) as sort of the vehicle for
11:04:23 18 establishing jurisdiction which is undisputed, it's clear
11:04:27 19 that Soto Massini(USA) is just an agent for Mr. Pichler. He
11:04:32 20 controls and dominates it. Every decision they have made
11:04:36 21 about infringement has been his decision. We think that
11:04:39 22 opens the door to exercising jurisdiction over him through
11:04:45 23 this agency theory.

11:04:47 24 THE COURT: What is the test for an agency
11:04:49 25 theory that you're asserting?

11:04:54 1 MR. LYONS: Well, in this case I think it's
11:04:56 2 showing that they're dominating and controlling the party
11:05:01 3 that is acting as an agent. So the agent is under the
11:05:06 4 dominion and control of the individual. I think in this
11:05:10 5 case that's exactly where we are with Mr. Pichler by his own
11:05:15 6 assertions.

11:05:18 7 We also think that there is a justifiable basis
11:05:22 8 for asserting jurisdiction over Mr. Pichler based on an
11:05:25 9 alterego theory and piercing the corporate veil.

11:05:30 10 And, you know, we've already established through
11:05:34 11 his own statements that he's a one-man show. He does
11:05:37 12 everything. It's his company. But we found -- there is a
11:05:41 13 number of reasons why I think it makes sense for this Court
11:05:44 14 to pierce the corporate veil, get behind the corporation in
11:05:47 15 this case.

11:05:48 16 First of all, there has just been a complete
11:05:52 17 collapse in the following of corporate formalities. The
11:05:57 18 most recent submissions, probably the most stunning where
11:06:00 19 they acknowledge that they haven't been filing any taxes.
11:06:03 20 They were incorporated in 2016. They didn't file taxes in
11:06:06 21 2016, in 2017, and they haven't yet for 2018, either.

11:06:14 22 They were set up and operating in California.
11:06:21 23 That's where they have a facility where all the shoes that
11:06:23 24 they're distributing to customers worldwide are received and
11:06:28 25 put through some sort of qualification or review process.

11:06:33 1 They never registered with the California Secretary of State
11:06:37 2 as doing business in the State of California. No formal
11:06:43 3 financial corporate records at all. I mean, it's just, it's
11:06:48 4 stunning.

11:06:49 5 And the response has simply been, well, you
11:06:53 6 know, we're going to hire an accountant and we're going to
11:06:57 7 get to it. This corporation has been in existence since
11:07:00 8 2016. And it's just outrageous that they're getting through
11:07:05 9 at this point, specific admissions, they don't have a profit
11:07:08 10 and loss statement, they don't have an accounting data basis
11:07:12 11 or direct admissions from the principal, it's just amazing.
11:07:15 12 The primary excuse for that was well, we didn't really do
11:07:20 13 any business before 2016. As we've seen, that's not
11:07:25 14 accurate. When we get into some of the -- some of the other
11:07:28 15 really stunning things that have come to light is a lot of
11:07:32 16 the assertions that they have made about the business, we
11:07:35 17 have just categorically found to be false. They been
11:07:41 18 selling, for example, in brick and mortar stores. We have
11:07:44 19 photographs of the storefronts. We have gone to the stores.
11:07:47 20 We have bought their shoes. This after the principal,
11:07:50 21 Mr. Pichler, testified every way that you can imagine that
11:07:54 22 he's never sold at a brick and mortar store. He's never
11:07:58 23 sold outside of the Kickstarter Indiegogo.

11:08:02 24 So the whole -- the collapse of the corporate
11:08:06 25 formalities has made it just all that much more difficult to

11:08:10 1 figure out what's going on with these companies.

11:08:12 2 This is just a facade for Mr. Pichler. That's
11:08:17 3 one of the factors the Court looks at, not only whether
11:08:23 4 there has been a failure to respect the corporate
11:08:28 5 formalities, but I think even Mr. Pichler appears to
11:08:29 6 acknowledge that it's really just a facade for him. There
11:08:32 7 is really not a functioning board and officers, it's just
11:08:35 8 Mr. Pichler making decisions. And those are three of the
11:08:39 9 main factors that are often considered in deciding whether
11:08:43 10 an alterego ruling should be found.

11:08:48 11 I would note that a lot of the financial factors
11:08:51 12 that are considered, things like undercapitalization,
11:08:55 13 nonpayment of dividends, siphoning of funds to the primary
11:09:02 14 shareholder, all these financial questions, they really
11:09:05 15 going to our motion to compel where he admits he's got all
11:09:08 16 these bank records that haven't been produced. He's given
11:09:11 17 us a carefully choreograph set of screen shots that must
11:09:17 18 have taken him a lot longer to put together than just
11:09:20 19 copying the bank statements would have been. He now says
11:09:23 20 that all these papers have mysteriously vanished into the
11:09:28 21 hands of some accountant who is summarizing them and at some
11:09:32 22 future unspecified date he's going to share them with us.

11:09:35 23 We're two months past the close of fact
11:09:38 24 discovery. We have got trial approaching in April. All of
11:09:42 25 this, when it comes to the alterego, the evidence that we

11:09:45 1 have is more than enough, I think, to justify piercing the
11:09:48 2 corporate veil. But it's also the evidence that we don't
11:09:53 3 have that's been withheld that should have been produced and
11:09:57 4 wasn't. We think even if you look at a sanction, we think
11:10:01 5 that also would justify piercing the corporate veil.

11:10:05 6 So when we look at this case, we just see no
11:10:08 7 justification for allowing Mr. Pichler to hide behind the
11:10:13 8 corporation.

11:10:13 9 I have to say, the reason this case -- one of
11:10:17 10 the first things that happened in this case is we filed a
11:10:20 11 motion for a preliminary injunction that was heard by Judge
11:10:25 12 Sleet. And we were very concerned that the funds that were
11:10:29 13 coming into the company from Kickstarter, from Indiegogo
11:10:35 14 were going to disappear. And Mr. Pichler basically told the
11:10:38 15 Court, he said, I live in San Diego. I have got two
11:10:43 16 school-aged kids. And Judge Sleet said I originally was
11:10:46 17 concerned this was essentially a flight risk sort of
11:10:49 18 situation was the word that he used, and he got a
11:10:52 19 declaration and essentially told him, you know, he's not
11:10:55 20 going anywhere. Well, Mr. Pichler is now gone. He has left
11:11:00 21 the country. He liquidated all of his assets in California.
11:11:04 22 He now lives in Columbia. I mean, we have got him --
11:11:08 23 literally we took his deposition in Miami. And I think even
11:11:13 24 that night he was leaving the country for Columbia.

11:11:16 25 And so I think this is a case where we've had a

11:11:21 1 party who has been making representations over and over
11:11:24 2 which have just proven not to be reliable. And I think the
11:11:29 3 use of the corporate form to shield himself personally from
11:11:36 4 any liability in this case really is not in any way
11:11:39 5 justified.

11:11:39 6 There is another defendant in this case, the
11:11:43 7 Soto Massini Italy entity. Mr. Pichler in his declaration
11:11:49 8 said over and over again, this is a company that has never
11:11:52 9 done anything. Has never done -- he submitted to Judge
11:11:57 10 Sleet in the motions relating to the preliminary injunction
11:12:02 11 that this company has never done anything. It doesn't have
11:12:04 12 any activity. It has never transacted business of any kind.

11:12:08 13 THE COURT: Where is the evidence that that
11:12:10 14 company has ever done anything in the United States? I saw
11:12:13 15 this in the supplemental filings. You sort of said oh, it's
11:12:18 16 all kind of one thing under Mr. Pichler. But I don't really
11:12:22 17 see any evidence of action of the Italian company in the
11:12:26 18 United States.

11:12:27 19 MR. LYONS: Well, what was conceded in
11:12:29 20 Mr. Pichler's deposition is that there is an iPhone app,
11:12:35 21 Android app that was registered in the name of the Italian
11:12:40 22 company. And that customers in the U.S. use that to measure
11:12:47 23 their feet and size them.

11:12:51 24 THE COURT: Is that an act of infringement,
11:12:52 25 though?

11:12:53 1 MR. LYONS: Well, it's certainly supporting the
11:12:54 2 sales which is an act of infringement.

11:12:56 3 THE COURT: But measuring your feet isn't
11:12:59 4 offering it for sale or selling; right?

11:13:01 5 MR. LYONS: I agree, Your Honor. Just that
11:13:03 6 alone wouldn't qualify. And I will say, Your Honor, I think
11:13:07 7 from our perspective, the most important thing is that
11:13:12 8 Mr. Pichler be personally responsible in this case. We also
11:13:16 9 think his Italian company, they have played a role in
11:13:21 10 supporting the sales, so we think it would be appropriate,
11:13:26 11 but I think it's probably less significant that they become
11:13:29 12 a party to this case.

11:13:33 13 THE COURT: Why don't we talk about the
11:13:38 14 discovery issues and the sanctions.

11:13:41 15 MR. LYONS: Certainly.

11:13:41 16 THE COURT: I certainly understand your
11:13:43 17 frustration with the discovery issues in reading through
11:13:46 18 this and reading the response. Where I'm uncertain, though,
11:13:54 19 is in your request for adverse inferences, essentially
11:13:59 20 sanctions under Rule 37. And even in the case that you
11:14:02 21 cited to me there was an order that had essentially been
11:14:06 22 violated before the sanctions came into play. And I don't
11:14:09 23 see that here because even in my prior order, I didn't
11:14:13 24 really order the production of the documents which perhaps
11:14:16 25 was my issue, but I don't have that here. So I need to

11:14:21 1 understand and what I was hoping for when I asked for some
11:14:25 2 legal support was what is the basis to seek sanctions at
11:14:30 3 this point?

11:14:32 4 MR. LYONS: I agree with Your Honor, there was
11:14:36 5 not a direct order to produce documents. I think the path
11:14:41 6 to a sanction here is really where withholding and hiding,
11:14:46 7 actively hiding relative evidence is tantamount to
11:14:54 8 spoliation or failure to produce. And so this is more of a
11:14:58 9 Rule 37(e) type situation rather than where there is a
11:15:00 10 direct order, produce this now and then it wasn't produced.

11:15:04 11 You know, the facts here are pretty stunning. I
11:15:07 12 mean, Mr. Pichler could not have been more emphatic in
11:15:14 13 saying that they have never sold any products in a brick and
11:15:17 14 mortar store. He said that repeatedly. I asked him at his
11:15:21 15 deposition, "You never sold, for example, in a store in
11:15:25 16 Milan?"

11:15:25 17 "No, absolutely not."

11:15:26 18 Well, as I said, and as we submitted, Your
11:15:29 19 Honor, we have got pictures of the storefront where he's
11:15:33 20 selling them. We now have a representation from counsel
11:15:35 21 where they basically admit, oh, well, there were some sales,
11:15:39 22 but don't worry about it. There weren't that many and it
11:15:42 23 was all done at cost. But, of course, that's what they have
11:15:45 24 been telling us in the U.S., too, they said he's made no
11:15:50 25 money, he only sells at cost. And he only sells through

11:15:54 1 these two campaigns.

11:15:57 2 So we now have absolute proof that he was hiding
11:16:00 3 sales of accused products. And it wasn't just the Italian
11:16:05 4 sales, we have evidence about their sales through
11:16:08 5 Kickstarter and through Indiegogo, but we also knew about
11:16:13 6 their own online stores, the VIPSotoMassini.com. And they
11:16:20 7 said you can't buy shoes there unless you're a backer.
11:16:24 8 Well, we have bought shoes there. My paralegal bought shoes
11:16:28 9 there. The expert in this case bought shoes there. They
11:16:31 10 weren't backers, they went on and did this.

11:16:34 11 And as we submitted in this Exhibit 4 -- no,
11:16:38 12 sorry, that's our -- that's the photo of the storefront.

11:16:42 13 In our Exhibit 6, I'm sorry, we actually have
11:16:48 14 messages from his associates who he had a team of people who
11:16:54 15 were helping him to promote his shoes. And in those
11:17:00 16 messages, we have Tracy LeCoist saying oh, I just talked to
11:17:06 17 Mr. Pichler and he said we can sell these on Soto Massini
11:17:09 18 and it doesn't even matter if they were backers. It is a
11:17:13 19 direct quote from his associate saying she got this
11:17:17 20 directive from him.

11:17:18 21 The full quote is, "So Thomas" -- that's
11:17:22 22 Mr. Pichler -- "just told me that anyone can order through
11:17:25 23 the VIP stores, even if they didn't back the KS," -- that's
11:17:30 24 Kickstarter project -- "which I didn't realize. We're now
11:17:33 25 advertising it, but can PM" -- that's private message --

11:17:37 1 "people with a link to the store if they ask how they can
11:17:41 2 get the shoes. Here is the link. VIP.SotoMassini.com."

11:17:48 3 So here again we have got sales of accused
11:17:50 4 products that they denied existed over and over; that when
11:17:55 5 we moved to compel, they told Your Honor nothing exist.
11:17:59 6 Basically when they're getting caught, they're dribbling out
11:18:04 7 a little bit more information. And at some point, it
11:18:08 8 amounts to spoliation of evidence.

11:18:12 9 I mean, the evidence if it's not being produced,
11:18:17 10 then it's being withheld and effectively destroyed. And I
11:18:22 11 think that gives the Court the power to issue sanctions. At
11:18:28 12 the very least to find that the withheld discovery would
11:18:31 13 have been very favorable to us, or when you look at the
11:18:34 14 Monsanto case that we cite, that was the one with the facts
11:18:39 15 that most closely paralleled what was going on here because
11:18:45 16 you had a defendant basically denying the existence of
11:18:48 17 accused products. In that case it was these patented seeds.
11:18:51 18 And no, no, no, don't look here, there are no seeds here and
11:18:56 19 then we go find seeds at the neighbor's barn. And of course
11:19:00 20 they had some there. Where are the next ones?

11:19:02 21 We don't know where else they may be selling
11:19:06 22 these. At some point it's not fair in our view to put the
11:19:09 23 burden on us when it's been proven that this defendant has
11:19:13 24 just flat out been dishonest in revealing the full scope and
11:19:19 25 nature of the sales.

11:19:21 1 So in our view, we think we're in the Monsanto
11:19:25 2 situation where a finding of infringement would be
11:19:27 3 appropriate, but at the very least a finding of an adverse
11:19:31 4 inference that the withheld information would be very
11:19:35 5 favorable to us.

11:19:36 6 We talked a little bit about the bank records
11:19:39 7 already. You know, this is something that definitely hurt
11:19:45 8 us in our ability to put together the complete story on
11:19:48 9 alterego. If we had all the banking information, we would
11:19:52 10 have a better idea of what's been going on on the funds. I
11:19:56 11 think it's appropriate for Your Honor to rely on the failure
11:19:59 12 to timely provide those bank records at the very least as
11:20:03 13 further support for a ruling piercing the corporate veil as
11:20:09 14 to Mr. Pichler as an individual. And certainly -- and we
11:20:16 15 still don't have those documents. They're still not out
11:20:20 16 there.

11:20:20 17 The cost summaries, some of the things that have
11:20:24 18 happened in this case, you just scratch your head. The
11:20:27 19 evidence they gave us for costs was essentially just a
11:20:30 20 handwritten document that Mr. Pichler put together. And
11:20:34 21 then at his deposition when he sees this document, he says
11:20:37 22 well, this is not even the latest draft of this. And I
11:20:41 23 prepared another draft with my lawyer. This is a lawyer in
11:20:47 24 California, Mr. Lobbin, not counsel who is present, and for
11:20:51 25 whatever reason that counsel never provided that to us. In

11:20:55 1 fact, it was just produced very, very recently, months after
11:20:58 2 the deposition. Again, we don't have any of this relevant
11:21:02 3 information when we needed it.

11:21:04 4 Another just -- and we don't have any of the
11:21:08 5 underlying data. So that's where when you get into costs,
11:21:13 6 you have got these sort of handwritten just sort of, I don't
11:21:17 7 know what you call them, just his sort of assertions of
11:21:21 8 costs without any underlying data. And when you're talking
11:21:25 9 about, you know, this is somebody who has a small operation
11:21:27 10 making shoes, what are your major costs going to be? Well,
11:21:31 11 who is making the shoes?

11:21:34 12 So this is a case where there are no agreements
11:21:39 13 that have been produced between anyone and the company that
11:21:44 14 makes the shoes, no invoices.

11:21:46 15 THE COURT: Where are the shoes made?

11:21:49 16 MR. LYONS: Sri Lanka.

11:21:51 17 So what Mr. Pichler testified in his deposition
11:21:53 18 was this company called Service in Sri Lanka who he has a
11:22:00 19 relationship, and the shoes are manufactured there. They're
11:22:07 20 shipped to Pakistan where they're sort of boxed into a form
11:22:15 21 that they could then be sold to customers, so they put like
11:22:18 22 a care card and the packaging. That all then gets shipped,
11:22:23 23 at least at the time of his deposition, he said, to a
11:22:27 24 warehouse space that he rents in California where they kind
11:22:31 25 of confirm everything, and then shipped directly to

11:22:36 1 customers from this warehouse in California. That's our
11:22:39 2 understanding of the process.

11:22:41 3 We know that because Mr. Pichler told us that's
11:22:45 4 how it happens. We basically have no documents that really
11:22:49 5 authenticate any of this.

11:22:50 6 In his deposition, he did give us one agreement
11:22:55 7 with this service company, and it was signed by Mr. Pichler
11:23:00 8 in his own individual capacity, nothing to do with Soto
11:23:04 9 Massini. He brought it out when I was asking him about
11:23:08 10 sales of the accused products as evidence of who was making
11:23:12 11 the accused products. And the more recent submissions to
11:23:15 12 the court, he said oh, that had to do with an earlier
11:23:19 13 product. It had nothing to do with anything in this case.

11:23:22 14 So we're kind of back to square one where the
11:23:25 15 only piece of paper that we have ever seen that reflects the
11:23:30 16 relationship with his manufacturer they said was irrelevant.
11:23:34 17 But the one important fact about it is it was in the name of
11:23:38 18 Mr. Pichler himself and not his company.

11:23:40 19 But it puts us in a position to try to determine
11:23:43 20 costs with no reliable underlying data and documents with a
11:23:47 21 company who does not keep any real business records, they've
11:23:52 22 admitted that, although they're saying they're trying to
11:23:56 23 create somehow as we're heading to trial. As you have seen
11:24:01 24 in the cases that we have submitted, a number of courts have
11:24:05 25 found where there has been discovery failures with regard to

11:24:08 1 providing evidence of costs that the appropriate sanction is
11:24:14 2 that a party can't use those costs to argue for a reduction
11:24:19 3 in the profits made by the company. You just look at the
11:24:22 4 revenue and you don't deduct the costs. We think that's
11:24:27 5 more than appropriate under the circumstances here when two
11:24:30 6 months after discovery, we don't have any credible evidence
11:24:34 7 at all related to costs.

11:24:36 8 And the very last issue, Your Honor, in all
11:24:40 9 this, and this was just another stunning one for
11:24:46 10 Mr. Pichler's deposition. This is a case about trademark
11:24:49 11 infringement, and you know, one of the issues that's so
11:24:54 12 important is likelihood of success and showing secondary
11:24:59 13 meaning of our products. And so, of course, one of the
11:25:03 14 things we asked for was any correspondence with their
11:25:07 15 customers, Soto Massini customers where they referenced our
11:25:11 16 client, Gavrieli, or our client's trademark products, the
11:25:20 17 Tieks shoe. This was about a month after counsel had
11:25:23 18 represented to Your Honor that every single relevant
11:25:26 19 document had been produced. And I asked Mr. Pichler a
11:25:31 20 simple question. I said, did you look at any of these
11:25:34 21 e-mails which he then by that point admitted in his
11:25:37 22 deposition that he had gotten many, many customer e-mails.
11:25:41 23 I said did you look for any e-mails for Tieks or Gavrieli,
11:25:46 24 he said nope, I did not. There was not even the tiniest
11:25:51 25 effort made to do that.

11:25:52 1 Since that time -- their initial response to
11:25:55 2 that was they were not going to produce them anyway. As we
11:25:59 3 have escalated and threaten to file letter briefs and filed
11:26:04 4 letter briefs, we have now gotten a handful of those
11:26:08 5 e-mails, but frankly --

11:26:08 6 THE COURT: And those are from at least the
11:26:10 7 support at Soto Massini, but you also still want them from
11:26:16 8 T. Pichler at Soto Massini; right?

11:26:19 9 MR. LYONS: We want a full set of all the
11:26:22 10 e-mails. The handful that we have certainly we think we're
11:26:28 11 entitled to, we're entitled to everything. We really have
11:26:31 12 no confidence that we have got them. And frankly after some
11:26:34 13 of the other things that we have been told that on further
11:26:38 14 investigation didn't stand up, we're really skeptical about
11:26:42 15 whether we're going to get them. That's why we think an
11:26:45 16 appropriate adverse inference at this point is that there
11:26:51 17 are e-mails that support the likelihood of confusion and
11:26:56 18 support the idea that the Tieks brand has achieved secondary
11:27:02 19 meaning, we think that's the appropriate relief, because we
11:27:07 20 have no confidence we're ever going to get a full set of
11:27:12 21 documents at this point, Your Honor.

11:27:13 22 THE COURT: Okay. Mr. Stamoulis.

11:27:27 23 MR. STAMOULIS: Good morning, Your Honor. So we
11:27:35 24 can start at the beginning again and go through the motion
11:27:38 25 to dismiss issues if you like.

11:27:40 1 THE COURT: Please.

11:27:41 2 MR. STAMOULIS: So with regard to Mr. Pichler,
11:27:46 3 you know, it's interesting being on this side of the table
11:27:50 4 because the law that's being asserted by the defendants
11:27:55 5 here -- I'm sorry, by the plaintiffs here is what I wish was
11:27:58 6 the law when I'm a plaintiff.

11:28:01 7 So you know, in the first instance, I think what
11:28:05 8 we have here is a situation where you have a sole
11:28:09 9 proprietorship. And if you break down their argument with
11:28:15 10 regard to how this business is run, I don't see how any sole
11:28:21 11 proprietorship would survive the agency test and the
11:28:29 12 alterego test that they're putting forward here. Clearly if
11:28:33 13 you're going to have a sole proprietorship business, you're
11:28:36 14 going to have one person that's going to dominate the
11:28:39 15 company, one person that's going to do all the research and
11:28:42 16 development and marketing. So there essentially would be no
11:28:45 17 purpose in creating a corporation, you know, if you are to
11:28:51 18 pierce the veil and hold an agency theory to be valid any
11:28:58 19 time that you have that kind of close interaction because
11:29:01 20 you're always going to have that close interaction with a
11:29:05 21 sole proprietorship.

11:29:05 22 So, you know, clearly there is an
11:29:13 23 unsophisticated nature to the company. I mean, you know,
11:29:17 24 there is no excuse for not filing tax returns because you
11:29:20 25 didn't think you didn't do any business. But certainly that

11:29:27 1 kind of failure, you know, does not rise to the level of
11:29:36 2 piercing the corporate veil or holding an agency here.

11:29:40 3 THE COURT: What about the argument that you say
11:29:42 4 look, they only come up with two, one or two at most of the
11:29:48 5 factors that the Third Circuit looks at for the alterego
11:29:53 6 theory, but I take Mr. Lyons' point that some of the stuff
11:29:56 7 that he's asked for that might support it and in light of
11:30:00 8 allegations that have been made may very well support it you
11:30:03 9 haven't produced to him. Why can't I, at least for the
11:30:07 10 purposes of this motion, have an adverse inference that
11:30:11 11 those documents would support the argument that plaintiff is
11:30:15 12 making?

11:30:18 13 MR. STAMOULIS: If we jump to the document issue
11:30:20 14 for a moment, I think a lot of the documents that they are
11:30:24 15 requesting are documents that need to be created, that
11:30:28 16 didn't exist at the time that they asked for them. And that
11:30:32 17 --

11:30:32 18 THE COURT: But they asked for them a long time
11:30:34 19 ago. And now you're telling me two months after fact
11:30:38 20 discovery has ended, or almost two months after fact
11:30:42 21 discovery has ended that you still need to create. So I
11:30:47 22 take their frustration here. You knew when the trial was.
11:30:50 23 You knew when discovery was. You knew that the documents
11:30:53 24 were asked for. But your client is now just making up
11:30:56 25 documents from 2016? If you were the plaintiff, wouldn't

11:31:00 1 you find that somewhat objectionable?

11:31:04 2 MR. STAMOULIS: Your Honor, I think that at
11:31:06 3 least in terms of the adverse inference that they're looking
11:31:10 4 for, if there were documents that existed that were there
11:31:15 5 and available and that weren't turned over, that's one
11:31:19 6 thing. If there is documents that need to be created, I
11:31:22 7 think that's a different category. And so I think in this
11:31:26 8 situation, especially because, you know, these are documents
11:31:30 9 that are not going towards liability, they're going towards
11:31:35 10 damages.

11:31:35 11 And so, you know, I don't think it rises to the
11:31:41 12 level given the circumstances and the situation where an
11:31:46 13 adverse inference would be appropriate. And also, as Your
11:31:49 14 Honor noted, the fact that there was no order from the Court
11:31:55 15 directing a date certain for something to be done
11:32:00 16 affirmatively by the defendant here in terms of creation.

11:32:06 17 The one point I would also throw out there just
11:32:11 18 before we leave the motion to dismiss stage, there are
11:32:16 19 design patent claims that are at issue here, and I believe
11:32:21 20 that TC Heartland would apply to design patent claims. I
11:32:24 21 have not seen that addressed. But I don't think that there
11:32:27 22 is any question that Mr. Pichler personally, not a resident
11:32:31 23 of the State of Delaware, there would be no personal
11:32:33 24 jurisdiction against him in the State of Delaware that would
11:32:36 25 be appropriate under TC Heartland.

11:32:39 1 THE COURT: Is that in your brief?

11:32:41 2 MR. STAMOULIS: I'm new to this case. And a lot
11:32:44 3 of these papers were drafted long before I came to this
11:32:47 4 case. But having seen that, it's the first thing that, you
11:32:52 5 know, jumped out at me that really merely being associated
11:32:59 6 with a company I don't think overcomes the law of
11:33:05 7 jurisdiction under TC Heartland. I wish it did, I would use
11:33:09 8 that all the time as a plaintiff. But that's just not the
11:33:14 9 law. So that is -- that's what I have to say about
11:33:21 10 Mr. Pichler and his personal jurisdiction here.

11:33:26 11 Soto Massini, I don't know if Your Honor is
11:33:28 12 interested in hearing anything about that. Obviously the
11:33:34 13 loose jurisdictional theory that they're applying here where
11:33:39 14 they're implying some sort of agency and being able to bring
11:33:42 15 in the foreign company because they themselves have deemed
11:33:48 16 the U.S. company an agent of that foreign company, I wish
11:33:53 17 that was the law. If I could bring in Samsung Korea every
11:33:56 18 time I sued Samsung USA just because I say they're the
11:34:00 19 agent.

11:34:00 20 THE COURT: What about trade dress, you
11:34:02 21 mentioned the patent issue, what about trade dress and false
11:34:07 22 advertising and a number of the others?

11:34:12 23 MR. STAMOULIS: For that we go back to whether
11:34:14 24 Mr. Pichler acted in his individual capacity or acted as a
11:34:18 25 sole proprietor of a corporation that he duly formed and

11:34:21 1 incorporated in the State of Delaware. And I think that the
11:34:27 2 law in the State of Delaware is fairly sophisticated with
11:34:31 3 regard to what it takes to disregard the corporate form. I
11:34:37 4 think it's a tough nut to crack in Delaware. And I think
11:34:41 5 even with the lack of the filing of the tax returns, I don't
11:34:47 6 think that at this stage they have pled sufficient facts so
11:34:52 7 that this Court can just say that it's appropriate to
11:34:56 8 disregard the corporate formalities and hold him personally
11:34:59 9 responsible for the actions of the company.

11:35:01 10 I think that's something, at least in my
11:35:04 11 experience, that's something that comes down the line is,
11:35:08 12 you know, that if and when there is liability in this case,
11:35:16 13 and if and when they feel that they cannot get satisfaction
11:35:19 14 by going after Soto USA, then there is a separate action to
11:35:25 15 pierce the corporate veil in the Court of Chancery.

11:35:30 16 I'm dealing with that exact matter right now
11:35:32 17 where we had an infringement trial and the other party felt
11:35:38 18 that the corporate veil should be pierced and we're
11:35:44 19 proceeding in the Court of Chancery for that. Judge
11:35:48 20 Robinson didn't have to deal with that.

11:35:49 21 So I think that would be the appropriate way to
11:35:52 22 deal with it here. If they feel they need that extra step,
11:35:56 23 they should come after liability is established.

11:36:04 24 THE COURT: Just one thing. Sorry about that.
11:36:07 25 Go ahead.

11:36:08 1 MR. STAMOULIS: Also, Your Honor, I will note
11:36:10 2 for the record, obviously you have the briefing on the
11:36:12 3 service issue for Soto Italy, again, implying an agency
11:36:17 4 relationship and serving a U.S. entity, I wish that was the
11:36:20 5 law. I would do it all the time if it was. It's not. And
11:36:24 6 so I think it's very clear that Soto Italy is improper.

11:36:28 7 Again, with regard to the discovery, I have
11:36:31 8 already mentioned to Your Honor that most of the documents
11:36:37 9 that they're asking for are documents that need to be
11:36:40 10 created. There hadn't been an existing order prior giving
11:36:44 11 them a date to create these documents.

11:36:48 12 They make a lot about these sales in Milan,
11:36:53 13 which I guess, you know, could go to the credibility of the
11:36:59 14 witness, you know, if, in fact, they knew about those sales
11:37:05 15 in advance. But sales in Milan really have nothing to do
11:37:11 16 with any of the claims that are at issue before the Court,
11:37:16 17 before Your Honor.

11:37:17 18 THE COURT: One moment. I apologize.

11:37:24 19 MR. STAMOULIS: There is no trade dress or
11:37:27 20 design patent liability for anything that happens overseas.

11:37:30 21 THE COURT: Are the brick and mortar sales that
11:37:33 22 were referenced, are those only in Milan or are those
11:37:37 23 elsewhere?

11:37:38 24 MR. STAMOULIS: All that I have seen has been
11:37:43 25 overseas. And from the letters that were submitted, what

11:37:47 1 was represented to the Court is that there were a hundred
11:37:49 2 and so sample pairs that were produced that were given to
11:37:53 3 various vendors to look at and, you know, try, and
11:37:58 4 apparently some of those vendors turned around and started
11:38:01 5 selling them and they took pictures of them, but that
11:38:04 6 happened overseas.

11:38:05 7 And, you know, the same thing goes with these
11:38:10 8 VIP website sales. So they structured the Kickstarter and
11:38:20 9 Indiegogo campaigns so that the sales would be done all
11:38:22 10 through those entities. Apparently there was a workaround.
11:38:27 11 But what I will note, Your Honor, is that there was no sort
11:38:30 12 of intent to hide sales from that workaround. I think
11:38:34 13 that -- I couldn't find the exact place in all the papers
11:38:38 14 that were produced, but I believe that the paralegal from
11:38:44 15 Morgan Lewis that got on and purchased the shoes, that that
11:38:47 16 sale was actually reported to them as an Indiegogo sale, so
11:38:54 17 it's not like they were hiding those sales, they were
11:38:57 18 lumping them in with the Indiegogo campaign.

11:39:01 19 So I think that also speaks to with regard to
11:39:06 20 whatever adverse inference Your Honor is considering, I
11:39:11 21 think proportionality should be something that Your Honor
11:39:15 22 thinks about. Clearly I think it would be disproportionate
11:39:22 23 to have an adverse inference of liability and damages based
11:39:28 24 on the facts that are present here and the circumstances
11:39:32 25 that we're in. And, you know, if Your Honor -- I mean, my

11:39:40 1 suggestion would be that if Your Honor would issue an order,
11:39:44 2 you know, providing a date certain, we will comply with it.

11:39:50 3 THE COURT: What is the date certain you want?

11:39:53 4 MR. STAMOULIS: Well, from what I'm told, Your
11:39:56 5 Honor, it really is one individual. And, you know, and the
11:40:02 6 accountant that he has hired to try to pull all these things
11:40:05 7 in order that had not been put in order.

11:40:08 8 THE COURT: But if he can give the accountant
11:40:12 9 the documents, certainly he can give them to Gavrieli's
11:40:15 10 counsel; right?

11:40:16 11 MR. STAMOULIS: I don't know if the accountant
11:40:18 12 has gotten documents. I think he has taken a computer.

11:40:21 13 THE COURT: When you ask for a date certain,
11:40:23 14 what are you thinking of, because trial is set for April
11:40:27 15 29th. Expert reports are in the process. So what are you
11:40:30 16 -- if I said a week.

11:40:34 17 MR. STAMOULIS: I would like two weeks, if I can
11:40:37 18 make -- I know I haven't spoken to the client, but I think
11:40:42 19 given where we are, I don't think that -- I'll agree with
11:40:46 20 Your Honor that more than that would not be appropriate.

11:40:49 21 THE COURT: Okay. Anything else?

11:40:56 22 MR. STAMOULIS: Nothing further, unless Your
11:40:58 23 Honor has questions.

11:40:58 24 THE COURT: Mr. Lyons, one question I had for
11:41:00 25 you is when you're asking for documents to all sales of the

11:41:05 1 accused products, are you asking for documents for worldwide
11:41:09 2 sales, U.S. sales, and if it's more than U.S. sales, I need
11:41:12 3 to understand the basis for that request.

11:41:16 4 MR. LYONS: Well, we did ask for worldwide
11:41:19 5 sales. And what Mr. Pichler testified to in his deposition
11:41:23 6 and as I described earlier, the way his network is set up,
11:41:28 7 they run everything through the U.S. So they were
11:41:32 8 manufacturing it in Sri Lanka, goes to Pakistan and then
11:41:36 9 it's shipped to a warehouse in California. So we think even
11:41:41 10 shoes that were going elsewhere in the world very likely
11:41:47 11 were being imported into the United States first, we think
11:41:51 12 it's relevant at least for that person.

11:41:54 13 THE COURT: Is there anything you wanted to
11:41:57 14 respond to?

11:41:58 15 MR. LYONS: Just very, very brief, Your Honor.
11:42:01 16 First of all in terms of timing, we do have expert reports
11:42:04 17 due on February 19th. And so producing materials in two
11:42:12 18 weeks is not going to be very helpful for that process if
11:42:18 19 that's where this ended up.

11:42:20 20 I just wanted to in terms of the TC Heartland
11:42:24 21 issue, that was something that was raised for the first time
11:42:26 22 in the oral argument. We have not had any time to look at
11:42:32 23 that. It has been shown that there were direct sales into
11:42:36 24 Delaware in connection with the Kickstarter campaign, so we
11:42:39 25 think that would give you jurisdiction under TC Heartland or

11:42:44 1 any other standard.

11:42:48 2 That's all I had, Your Honor.

11:42:49 3 THE COURT: Okay. But before I -- I want to go
11:42:56 4 back and think about this and come back, but before I do
11:43:00 5 that, I want to talk a little bit about the schedule. As
11:43:04 6 you suggested, we are a little crunched here, and I saw in
11:43:10 7 looking at the schedule that the way it's set up is that
11:43:13 8 summary judgment papers are to be filed on March 15th, which
11:43:18 9 would make them finished April 5th, and a pretrial
11:43:24 10 conference is April 16th. So clearly if you expect me to
11:43:28 11 pay any real attention to the summary judgment papers, we're
11:43:33 12 going to have to move something.

11:43:37 13 So can I ask both sides, what's the plan here?
11:43:41 14 Are you planning to move for summary judgment? And if so,
11:43:45 15 what do you expect me to do with those papers that I receive
11:43:49 16 less than a month before trial?

11:43:52 17 MR. LYONS: Our focus has been on trial. I
11:43:55 18 mean, there may be some specific issues that we would have
11:43:58 19 advanced that -- but I don't know that we were looking -- I
11:44:03 20 don't think we were going to proceed, Your Honor, with
11:44:08 21 comprehensive papers on every issue in the case. I think it
11:44:11 22 would have been more selective. But our plan has been to
11:44:14 23 meet the trial deadlines and go forward with the trial as
11:44:17 24 scheduled.

11:44:18 25 THE COURT: What about defendant?

11:44:20 1 MR. STAMOULIS: Your Honor, I don't believe that
11:44:22 2 we would move for summary judgment on any issue. Anything
11:44:25 3 that we would bring before Your Honor would probably be in
11:44:27 4 the form of a motion in limine.

11:44:30 5 THE COURT: And Mr. Lyons, if I were to keep the
11:44:36 6 trial date, would your client be willing to forgo filing of
11:44:42 7 summary judgment motions? And that's something you can tell
11:44:46 8 me in the letter later this week if you want after you talk
11:44:51 9 with them. But I'm not sure that we could have both,
11:44:56 10 summary judgment, at least in the way that I would have a
11:45:00 11 chance to read and think about and decide those motions in a
11:45:05 12 comprehensive way.

11:45:08 13 MR. LYONS: Understood, Your Honor. I can have
11:45:09 14 that conversation with my client.

11:45:10 15 THE COURT: Let's just take a quick break and
11:45:13 16 then we'll come back.

11:45:15 17 (A brief recess was taken.)

11:56:42 18 THE COURT: Please be seated.

11:56:44 19 Thank you for the arguments today. They were
11:56:47 20 helpful. And I am prepared to rule on the motion to dismiss
11:56:52 21 as well as the discovery issues.

11:56:55 22 First the motion to dismiss.

11:56:58 23 Defendants Thomas Pichler and SMS Italy have
11:57:03 24 moved to dismiss this case against them for lack of personal
11:57:07 25 jurisdiction and insufficient process under Rules 12(b)(2)

11:57:09 1 and 12(b)(5). And there are also allegations that the
11:57:12 2 complaint fails to state a claim against these defendants
11:57:15 3 pursuant to 12(b)(6), but the arguments for the grounds are
11:57:18 4 all essentially the same.

11:57:20 5 The Court has reviewed the briefs submitted by
11:57:22 6 the parties in connection with their motion and supplemental
11:57:25 7 submissions submitted after discovery had occurred. I have
11:57:28 8 also heard arguments today and for the reasons set forth
11:57:33 9 below I will deny the motion as to Mr. Pichler and grant the
11:57:36 10 motion as to SMS Italy.

11:57:38 11 When assessing personal jurisdiction, courts in
11:57:42 12 this district determine first whether Delaware's Long Arm
11:57:45 13 Statute permits jurisdiction and second, whether exercising
11:57:49 14 jurisdiction comports with due process. To overcome a
11:57:55 15 jurisdictional challenge the plaintiff needs to make out a
11:57:55 16 prima fascia case showing jurisdiction is appropriate based
11:57:58 17 on pleadings, affidavits and other written materials.

11:58:02 18 The Court must accept as true all allegations of
11:58:04 19 jurisdictional fact construed in the pleadings and
11:58:08 20 affidavits in the plaintiff's favor. The Delaware Supreme
11:58:10 21 Court has construed the state's long arm statute to confer
11:58:13 22 jurisdiction to the maximum extent possible under the due
11:58:17 23 process clause. That statute 10 Delaware Code Section
11:58:22 24 3104(c) states in relevant part that personal jurisdiction
11:58:26 25 is proper for either the defendant or its agent one,

1 transacts any business or performs any character of work or
2 service in the state, or section, subsection 4 causes
3 tortious injury in the state or outside of the state by an
4 act or omission outside the state if the person regularly
5 does or solicits business, engages in other persistent
6 course of conduct in the state or derives substantial
7 revenue from services or things used or consumed in the
8 state.

9 Courts in this district have exercised personal
10 jurisdiction under a "dual jurisdiction theory," which is a
11 hybrid of Section (c)(1) and (c)(4), and that's been done
12 where there is a showing of "an intent to serve the Delaware
13 market and that the intent results in the introduction of a
14 product in the market and that plaintiff's cause of action
15 arises from injuries caused by that product."

16 Due process requires that the defendant has
17 sufficient minimum contacts with the forum state such that
18 the maintenance of the suit does not offend traditional
19 notions of fair play and substantial justice. The plaintiff
20 bears the burden of establishing minimum context and upon
21 that showing the burden shifts to the defendant to prove
22 that the exercised jurisdiction would be unreasonable.

23 First, as to Mr. Pichler, he is a resident, or
24 was at the time of the filing, a resident of California. He
25 submitted a declaration to the Court stating that he had

1 never been to Delaware and that any interaction he has had
2 with the state has been in his capacity as a director of
3 Soto USA. The Court, however disagrees that the first
4 amended complaint fails to allege jurisdiction for claims
5 against Mr. Pichler. First, this Court has jurisdiction
6 over Mr. Pichler because the first amended complaint
7 sufficiently alleges that he personally sold and offered for
8 sale shoes infringing Gavrieli's design patent and trade
9 dress right as well as falsely advertising the infringing
10 shoes to the consumers in the United States including in
11 Delaware.

12 Mr. Pichler is also subject to personal
13 jurisdiction by virtue of this Court's jurisdiction over SM
14 USA under an agency and under an alterego theory. As to
15 agency, Mr. Pichler controls SM USA and dominates it. He
16 has authorized the actions that are relevant to this case.
17 SM USA is under his dominion and control.

18 As to an alterego theory to impute
19 jurisdictional context to Mr. Pichler, Gavrieli need only
20 prove that defendants functioned as a single entity and
21 should be treated as such. Relative factors in the Third
22 Circuit include some of those that were discussed today,
23 gross undercapitalization, failure to observe corporate
24 formalities, nonpayment of dividends, insolvency of debtor
25 corporation, siphoning of funds from the debtor corporation

12:01:24 1 by the dominant stockholder, nonfunctioning of officers and
12:01:28 2 directors, absent corporate records and whether the
12:01:31 3 corporation is merely a facade for the operations of the
12:01:34 4 dominant shareholder.

12:01:35 5 Here, Gavrieli alleges facts sufficient to
12:01:38 6 sustain an alterego theory of jurisdiction over Mr. Pichler.
12:01:43 7 It alleges, for example, that Mr. Pichler is the sole owner
12:01:46 8 of SM USA and has installed himself as the director of SM
12:01:52 9 USA. Mr. Pichler and SM USA use the same address, San
12:01:55 10 Diego, California. SM USA shares the same employees,
12:02:03 11 directors, officers and employees that essentially is the
12:02:06 12 one person, Mr. Pichler. Mr. Pichler and SM USA use the
12:02:11 13 same trade name, Soto Massini, disseminate the same product
12:02:16 14 catalogue and advertisements, operate the same social media
12:02:20 15 accounts and promote the same products.

12:02:21 16 Mr. Pichler failed to register SM USA with the
12:02:26 17 California Secretary of State despite conducting business in
12:02:28 18 California. Mr. Pichler has according to the first amended
12:02:31 19 complaint personally controlled, directed and/or supervised
12:02:34 20 SM USA's infringing sales and offers for sale and their
12:02:39 21 design, manufacture and/or marketing of the infringing
12:02:42 22 shoes.

12:02:42 23 In addition, it seems clear that no corporate
12:02:47 24 formalities have been followed. As stated in defendant's
12:02:51 25 discovery letters, SM USA is one man. The company has been

1 in existence since 2016, but it has not prepared any
2 corporate records or financial documents and had not filed
3 tax returns. There is no real board of directors. It is
4 not registered to do business.

5 The company and the man, Mr. Pichler, are
6 indistinguishable regarding the issues in this case and
7 Mr. Pichler is subject to jurisdiction by virtue of this
8 Court's jurisdiction over SM (USA) under at least agency and
9 alterego theories. The motion to dismiss him is therefore
10 denied.

11 As to SMS Italy, regarding general jurisdiction,
12 SMS Italy is a corporation organized in Italy with a
13 principal place of business in Milan. It appears that all
14 of SMS Italy's activities are conducted in Italy. With
15 respect to general jurisdiction in the amended complaint,
16 Gavrieli alleges that SMS Italy regularly and systematically
17 transacted business in its judicial district, yet there are
18 no facts to support that conclusion notwithstanding
19 Gavrieli's burden to show the necessary context with
20 Delaware.

21 It has not alleged context that are so
22 significant that as to have SMS Italy be essentially at home
23 in this forum. Specific jurisdiction is also not present
24 because the amended complaint contains some conclusionary
25 allegations that SMS Italy placed infringing products into

12:04:23 1 the stream of commerce, but it does not allege that SMS
12:04:27 2 Italy has put products into the stream of commerce in the
12:04:31 3 United States, has done any advertising in the United States
12:04:32 4 or offered any products for sale in the United States.

12:04:35 5 It does not allege that SMS has any connection
12:04:38 6 to this forum other than through Mr. Pichler and SMS in his
12:04:44 7 ownership of SMS USA. That does not satisfy the
12:04:48 8 requirements for personal jurisdiction. And as this Court
12:04:52 9 has previously noted, mere ownership of a subsidiary or
12:04:57 10 having a corporate relationship does not justify the
12:05:01 11 imposition of liability on a parent. So I'm going to grant
12:05:06 12 defendant's motion with respect to SMS Italy.

12:05:10 13 With respect to the motion to compel, I do find
12:05:15 14 it disturbing that we are here two months after the fact
12:05:19 15 discovery and there are documents that have not been
12:05:22 16 produced. I am also troubled that it appears that there
12:05:27 17 have been changing positions on the existence of those
12:05:32 18 documents throughout the course of discovery. That being
12:05:35 19 said, I am not yet convinced that I am in a position to
12:05:40 20 issue sanctions of the type that are requested by plaintiff.

12:05:43 21 So what I'm going to do is I'm going to order
12:05:46 22 that the defendant shall produce the documents that are
12:05:50 23 requested within two weeks. To be clear, I am going to walk
12:05:57 24 through the documents that are requested in the January 30th
12:06:03 25 letter submitted by plaintiffs.

1 First, documents showing all sales of the
2 accused products. I'm going to order that the defendants
3 produce documents showing all sales of the accused products
4 regardless of the channel by which they are sold. The sales
5 should include worldwide sales as there has been an
6 allegation that the products are imported into the United
7 States, all of the products that are sold are imported first
8 into the United States which would be an act of
9 infringement.

10 With respect to Section B of the letter,
11 complete bank records and statements for SM USA's bank
12 accounts, I am going to order that those be produced.
13 Having pictures of certain screen shots is not sufficient to
14 satisfy the requirements for the requests in this case.

15 With respect to C and D, which go to cost
16 summaries for the accused products, I'm going to order that
17 the cost summaries be produced. I understand that there has
18 been an updated handwritten document of cost summaries, but
19 in addition to that, I am ordering the production of the
20 underlying data for Mr. Pichler and the company that support
21 those numbers so that plaintiff can fairly look at those and
22 determine whether there are any issues.

23 Whether the underlying documents require
24 production of the invoices I can't tell at this point. All
25 I'm going to say is to the extent that the underlying data

12:07:47 1 includes invoices, I'll order that those be produced. If
12:07:50 2 that's not required, then you guys can have a discussion as
12:07:55 3 to the necessity of invoices.

12:07:57 4 E-mails sent to SM USA referencing Gavrieli or
12:08:04 5 Tieks, I'm going to order that a full set of all e-mails
12:08:07 6 from Mr. Pichler and the corporation including the e-mails
12:08:12 7 for the addresses Support@SotoMassini.com, and
12:08:18 8 TPichler@SotoMassini.com be produced to the extent that they
12:08:22 9 reference Gavrieli or Tieks.

12:08:25 10 And if there are other e-mail addresses for the
12:08:29 11 company or Mr. Pichler that are used for the company, those
12:08:35 12 should also be searched for references to Gavrieli or Tieks.

12:08:43 13 Now, the documents will be produced in two weeks
12:08:48 14 as defendants requested. I understand that that may cause
12:08:52 15 some problems with respect to the current expert discovery,
12:08:55 16 and at first blush I will ask the parties to discuss with
12:08:59 17 each other what is required in order to proceed in a way
12:09:07 18 that makes sense going forward given the late production of
12:09:12 19 documents.

12:09:13 20 With respect to dispositive motions, defendants
12:09:19 21 have indicated they don't intend to file motions for summary
12:09:25 22 judgment but rather would probably file motions in limine
12:09:29 23 pursuant to my scheduling order and I would ask you to
12:09:32 24 follow my provisions, my procedures for motions in limine
12:09:36 25 that are outlined in my draft scheduling order.

12:09:41 1 Plaintiff, I will ask you to get back to me by
12:09:45 2 the end of this week as to whether you intend to file
12:09:49 3 motions for summary judgment and I do caution, as I said
12:09:52 4 before, that should those motions be filed, it will likely
12:09:55 5 jeopardize the trial date.

12:09:57 6 And I think with that, we have addressed the
12:10:01 7 issues that we have here today. Is there anything else that
12:10:04 8 we should discuss?

12:10:12 9 MR. GORMAN: Nothing from plaintiff, Your Honor.

12:10:15 10 MR. STAMOULIS: Your Honor, if I could put a
12:10:16 11 reservation in, if plaintiff decides to go the motion route
12:10:20 12 and ends up kicking trial, at that point we might want to
12:10:24 13 have the opportunity to file a cross motion if we think it
12:10:28 14 will simplify the case. But again, that wouldn't be our
12:10:32 15 choice, that would be if they decide to go that route and
12:10:35 16 lose the trial date, we want to have the ability if we
12:10:38 17 decide that something else is needed then.

12:10:40 18 THE COURT: Well, I understand that you want to
12:10:43 19 put that reservation on the record and that is something
12:10:46 20 that the parties can discuss what makes sense if the
12:10:50 21 plaintiffs decide that they want to file motions for summary
12:10:53 22 judgment.

12:10:53 23 MR. STAMOULIS: Thank you, Your Honor.

12:10:54 24 THE COURT: Thank you.

12:10:55 25 (Court recessed at 12:10 p.m.)